Supreme Court, U. S.
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No. 97-1451

In The

Supreme Court of the United States

October Term, 1997

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE BUILDING INDUSTRY LEGAL DEFENSE FUND, COUNTY OF SAN BERNARDINO, CITY OF COLTON and CITY OF FONTANA,

Petitioners,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF INTERIOR
and
MOLLIE BEATTIE, DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* AMERICAN LAND FOUNDATION AND TEXAS JUSTICE FOUNDATION IN SUPPORT OF PETITIONERS

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I. Interest of the *Amici Curiae*

Amici Curiae American Land Foundation and Texas Justice Foundation (collectively referred to as "the Foundations" or *"amici"*)[1] respectfully submit this *amici curiae* brief in support of Petitioners because the Circuit Court decision below badly misreads this Court's landmark Commerce Clause decision in *U.S. v. Lopez* and thereby improperly upholds Congress' authority to regulate takes of the Delhi Sands Flower-loving Fly ("the Fly") – a purely intrastate, non-commercial activity that has no discernable effect upon interstate commerce and is not part of a commercial regulatory regime.

American Land Foundation is a 501(c)(3) non-profit organization dedicated to the advancement, protection and renewal of property rights and the constitutional principles of individual liberty, limited government, free enterprise and the freedom envisioned by our Founding Fathers. American Land Foundation was created by the Farm Credit Bank of Texas to provide a voice for the many small farmers and ranchers whose interests – preservation of property rights and the American farming and ranching heritage – are often threatened by the increasingly intrusive nature of governmental land use regulations.

Texas Justice Foundation is a 501(c)(3) non-profit organization that provides free legal representation in landmark cases to protect individual rights and limit

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

government to its appropriate role. Texas Justice Foundation seeks to protect, through litigation and education, those fundamental freedom and rights essential to the preservation of American society. To reinvigorate public education, strengthen the family, and promote the private sector business climate we must limit government to its traditional and appropriately limited role. Texas Justice Foundation seeks to protect those mediating structures – such as church, synagogue, home, and private business – which provide a bulwark of freedom for the individual against excessive intrusion of government. American Land Foundation sought and obtained[2] *amicus curiae* status at the Circuit court level and the Foundations now jointly seek *amici curiae* status here because the Endangered Species Act ("ESA") and Commerce Clause issues before this Honorable Court are very similar to litigation the Foundations have been involved in and which was recently decided by the Fifth Circuit Court of Appeals. *Sierra Club v. San Antonio, et al.*, 112 F.3d 789 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 879 (1998). While the Fifth Circuit acknowledged the Commerce Clause issue presented, it declined to reach the issue because the case could be decided on non-constitutional grounds. *Id.*

To *amici's* knowledge, there have been no reported decisions on the Commerce Clause issue as applied to the ESA other than this case[3] since the Supreme Court's landmark decision in *United States v. Lopez*, 514 U.S. 549,

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[2] American Land Foundation was known as Farm Credit Property Rights Foundation when the D.C. Circuit Court granted leave to file the *amicus* brief.

[3] *National Ass'n of Home Builders v. Babbitt*, 949 F.Supp 1 *aff'd* 130 F.3d 1041 (D.C. Cir. 1997) (hereinafter *"NAHB"*).

115 S.Ct. 624 (1995). As this Court is no doubt aware, the ESA in general, and the § 9 take provision in specific, have far-reaching effects on a landowner's ability to use and enjoy real property. This Court's examination of Congress' ESA authority, in light of *Lopez*, has tremendous implications in terms of both property rights and the limits of federal authority.

II. Summary of Argument

This is a very simple case. Under *Lopez's* three-part "substantial effects" analysis, the provision in question here – § 9(a)(1)(B) of the ESA and its prohibition against taking the Fly – cannot be upheld as a valid exercise of the commerce power. First, the regulated activity in this case is not in any sense a *commercial* activity, nor is it an integral part of a commercial regulatory regime. Second, the take provision does not contain a jurisdictional element. Third, the rationales offered in support of the take provision's application are both irrelevant to the proper inquiry and utterly without a logical stopping point.

To evade the conclusion *Lopez* compels, the courts below made several moves necessary to uphold the regulation. First, the scope of the substantial effects inquiry was radically expanded to encompass the effect of takes of *all endangered species*, rather than just the Fly at issue in this case. Second, the substantial effects inquiry was further expanded to take into account the attenuated and speculative future benefits which might derive from protection of endangered species. Third, the only nexus to interstate commerce was through an attenuated link to persons or products that are not the object of the regulation. Having thus radically expanded the scope of the

inquiry, the effects are then aggregated to demonstrate a substantial effect on interstate commerce.

Lopez forbids this type of expansive, attenuated and speculative substantial effects inquiry in cases such as this where the regulated activity is purely intrastate, non-commercial, and not an integral part of a commercial regulatory regime. Instead, the substantial effects inquiry must focus directly on the effect of the activity regulated. Because no reasonable person could assert that takes of the Fly assert a substantial effect on interstate commerce, the regulation of those takes is beyond Congress' Commerce Clause authority.

The lower courts – in this case and numerous others – have ignored *Lopez's* analysis of Congress' Commerce Clause authority. This case provides an excellent opportunity to revisit the Commerce Clause issue and remind the lower courts that *Lopez* is the law of the land.

III. Reasons For Granting Certiorari

A. Introduction

This Court's landmark decision in *Lopez* marked a watershed in modern Commerce Clause jurisprudence. Prior to *Lopez*, the U.S. Supreme Court had not once found that Congress had exceeded its Commerce Clause authority since the early New Deal in *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935). From the seminal case of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) until *Lopez*, this Court was so exceedingly deferential to congressional claims of Commerce Clause authority that it made one noteworthy commentator wryly "wonder why anyone would make the mistake of calling it the Commerce Clause instead of the 'Hey, you-can-do-whatever-you-feel-like Clause.' "

NAHB, 130 F.3d at 1061. (Sentelle, J., dissenting) *citing* Judge Alex Kozinski, *Introduction to Volume 19*, 19 HARVARD J. L. PUB. POL. 1, 5 (1995).

Lopez, of course, brought that era of "galactic growth of the Clause's application" to an end. *NAHB*, 130 F.3d at 1061. (Sentelle, J., dissenting) Unfortunately, after a brief period during which a few district courts followed *Lopez's* three-part analysis, the circuit courts have largely ignored *Lopez* and soldiered on as if they were still in the heyday of the "Hey, you-can-do-whatever-you-feel-like Clause." *Lopez's* relegation to the dustbin of ignored opinions is illustrated by both the Circuit Court's opinion in this case and the opinions of lower courts in other Commerce Clause matters.

Perhaps the lower courts' failure to follow *Lopez* is the result of inertia from sixty years of unlimited Commerce Clause jurisprudence. Whatever the reason, the lower courts apparently need to be reminded that *Lopez* is the law. The genius of our Constitution is its unique federal system in which federal and state governments are dual sovereigns and the federal government is a government of limited, enumerated powers from which a general police power was intentionally withheld. "This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.' " *Lopez*, 115 S.Ct. at 1626, *citing Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). "Just as the separation and independence of the coordinate branches of the federal government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the states and the federal government will reduce the risk of tyranny and abuse from either front." *Lopez*, 115 S.Ct. at 1626.

B. The Circuit Court's main and concurring opinions below sharply conflict with this Court's decision in *United States v. Lopez.*

The Circuit Court's main opinion by Judge Wald and Judge Henderson's concurring opinion ignore the *Lopez* analysis in favor of an expansive analysis reminiscent of pre-*Lopez* cases.

1. Lopez's three-part "substantial effects" analysis was ignored by Judges Wald and Henderson.

Central to the *Lopez* opinion is the "substantial effects" framework for determining whether Congress possesses the authority under the Commerce Clause to regulate an activity. In striking down the Gun-Free School Zones Act, the Court focused on three key issues:

1. Whether the statute in question, by its terms, regulates commercial or economic activity?
2. Whether the statute in question contains a jurisdictional element which ensures that the regulated activity substantially affects interstate commerce?
3. Whether the rationales offered to support the statute offer any logical stopping point, thus withholding from Congress a general police power retained only by the States?

Lopez, 115 S.Ct. at 1630-34.

a. The Wald opinion concedes that the regulated activity is non-commercial, but then ignores the ramifications of that critical determination; the Henderson opinion simply ignores the issue.

Plainly the most important element of the *Lopez* substantial effects analysis is the inquiry into whether the

regulated activity is "commercial" or "non-commercial" and the consequences that flow from this determination. Just as plainly, the regulated activity in this case – takes of the Fly – is not in any sense commercial. Judge Wald concedes this point: "The ESA . . . regulate[s] activities – destruction of endangered species . . . – that are carried out entirely within a state and which are not themselves commercial in character," yet completely misses the crucial significance and consequences of this determination. *NAHB v. Babbitt*, 130 F.3d at 1055. Judge Henderson's opinion simply ignores the commercial/non-commercial issue.

Misreading both *Lopez* and *Wickard v. Filburn*, 317 U.S. 111 (1942),[4] Judge Wald's opinion asserts that "a class of activities can substantially affect interstate commerce regardless of whether the activity at issue – in this case the taking of endangered species – is commercial or non-commercial." But *Lopez* makes exactly the opposite point: If the regulated activity is neither commercial, nor an essential part of a larger regulation of economic activity, it "cannot . . . be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate substantially affect interstate commerce." *Lopez*, 115 S.Ct. at 1630-31.

By ignoring this crucial element of *Lopez* and expansively defining the class of activities as the effects of taking endangered species generally, rather than the Fly, and then aggregating those effects, Judge Wald sidesteps

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[4] The aggregation principle first announced in *Wickard* has been followed by later Supreme Court cases such as *Perez v. United States*, 402 U.S. 146 (1971).

the obviously ridiculous proposition that takes of the Fly have any effect whatsoever on interstate commerce, much less a substantial one. Both the "class of activities" and "aggregation" principles applied by Judge Wald ignore *Lopez* and are based on an improper application of *Wickard*.

Wickard's aggregation principle – which allows relatively trivial instances of local economic activity to be regulated because of their aggregate economic effect – does not apply to the take provision's application in this case for two reasons. First, the Fly is found in only one tiny location in the entire world. Thus, any conceivable effect takes of the Fly could have on interstate commerce cannot be aggregated together with the effect of takes of the Fly elsewhere because they simply do not exist. Unlike Mr. Filburn's wheat – which competed with wheat throughout the state, the nation, and ultimately, the world – the Fly cannot possibly compete with state, national or international populations because they do not exist.

The second and primary reason aggregation cannot be applied in this case is that the take provision does not regulate *commercial* activity. *Lopez*, 115 S.Ct. at 1630. In contrast to the AAA in *Wickard*, the regulated activity in this case is not part of an overarching price support mechanism, nor is it part of any other type of economic or commercial regulation. Although Congress inserted jurisdictional elements requiring a nexus with commerce in several of § 9's provisions, it failed to do so with the take provision. Congress' failure to create a commercial nexus in the take provision forecloses application of the aggregation principle. After *Lopez*, reliance on *Wickard* to

analyze the commerce power in a case involving a non-economic intrastate activity is simply not tenable.

Thus in an as-applied case involving intrastate, non-commercial activity, the regulated activity must have a substantial effect on interstate commerce, *without regard to aggregation*. The Ninth Circuit properly set forth this test:

> [W]here Congress seeks to regulate a purely intrastate noncommercial activity that has traditionally been subject to exclusive regulation by state or local government, and where the connection of the regulated activity as a whole to interstate commerce is neither readily apparent nor illuminated by express congressional findings, the government must satisfy the jurisdictional requirement by pointing to a "substantial" effect on or connection to interstate commerce.

U.S. v. Pappadopoulos, 64 F.3d 522, 527 (9th Cir. 1995).

Because the intrastate activity regulated here is non-commercial and is not part of a framework of commercial regulation, Judges Wald and Henderson erred in aggregating the effect of takes of all endangered species. This error was case dispositive, and is similar to the type of aggregation/class of activities errors that lower courts throughout the country have been making in Commerce Clause cases. *See* Section C.1, *infra*.

b. The Wald and Henderson opinions do not even acknowledge that the take provision lacks a jurisdictional element, much less assign the proper significance to its absence.

In addition to missing the import of the take provision's "non-commercial" nature, Judges Wald and Henderson completely ignored the second element of the

substantial effects analysis – whether the statute in question contains a jurisdictional element. A regulation containing a jurisdictional element insures, through case-by-case inquiry, that the regulated activity substantially affects interstate commerce. *Lopez*, 115 S.Ct. at 1631. Like § 922(q) in question in *Lopez*, § 9(a)(1)(B) of the ESA contains no jurisdictional element. It simply prohibits all takes of listed species without regard to interstate commerce. The absence of a jurisdictional nexus in § 9(a)(1)(B) stands in stark contrast not just to other statutes, but even to other provisions in § 9 of the ESA. *Compare with* § 9(a)(1)(E) (unlawful to "deliver, receive, carry, transport, or ship in *interstate or foreign commerce*, by any means whatsoever and in the course of a *commercial activity*" any listed fish or wildlife species) and § 9(a)(1)(F) (unlawful to "sell or offer for sale *in interstate or foreign commerce*" any listed fish or wildlife species) (emphasis added). *See also* §§ 9(a)(2)(C) & (D) (same prohibitions regarding plant species). Both the Wald and Henderson opinions completely ignore this important aspect of *Lopez'* substantial effects analysis.

c. The rationales offered in the Wald and Henderson opinions are either inapposite or place no logical stopping point on Congress' Commerce Clause authority.

The third element of *Lopez's* substantial effects analysis centers on the rationales offered in support of the regulation. Those rationales must provide some logical stopping point to congressional authority. Otherwise, Congress' Commerce Clause power would in effect become a general police power of the sort intentionally withheld from the Federal Government. *Lopez*, 115 S.Ct.

at 1632-34. One such rationale offered by Judge Wald, which is premised on "biodiversity," posits that the extinction of a species, and the resulting reduction in biodiversity, has a substantial effect on interstate commerce by diminishing a natural resource that later could be used for commercial purposes. *NAHB*, 130 F.3d at 1052-54.

This biodiversity rationale suffers from two fundamental problems. As Judges Henderson and Sentelle both observed, the requisite substantial effect is premised on the speculative, future benefits which may flow from a species. *Id.* at 1064. In other words, there is no substantial effect today, but there may be one tomorrow. This sort of speculative and attenuated argument is plainly inadequate under *Lopez*. The second problem with the biodiversity rationale is related to the aggregation problem discussed above – the scope of the inquiry is improperly expanded from the Fly to "biodiversity" generally, which necessarily includes a universe of additional activity that can be added together to show a substantial effect.

Judge Henderson offers a similarly attenuated rationale that places no real limits on the commerce power. Although Judge Henderson ostensibly rejects Judge Wald's biodiversity rationale, the rationale she advances is substantially similar. Noting the "interconnectedness" of ecosystems and species, Judge Henderson says that the extinction of one species affects others and their ecosystems. *Id.* at 1058-59. Thus, she concludes, protection of a purely intrastate species (such as the Fly) will therefore substantially affect interstate commerce. *Id.* The problem with this "rationale" is that it is not a rationale at all – it is a complete *non-sequitur*. The premise that the extinction of a species affects other species and their ecosystems

does not lead to the conclusion that there is a substantial effect on interstate commerce. To make this connection requires not a logical step, but rather a leap of faith, or as Judge Sentelle put it, "There is no showing, but only the rankest of speculation, that a reduction or even the complete destruction of the viability of the Delhi Sands Flower-loving Fly will in fact affect land and objects that are involved in interstate commerce." *NAHB*, 130 F.3d at 1065 (internal quotes omitted).

Distilled to its essence, Judge Henderson's second rationale is based on the notion that the ESA protects habitat from land development and that the ESA's regulation of commercial land development (through the take provision) has a substantial effect on interstate commerce. This formulation stands the relevant inquiry on its head. The question is not whether *regulating an activity* will substantially affect interstate commerce (obviously, the economic effects of regulating even an intrastate, non-commercial activity can be "substantial"), but whether *the regulated activity itself* (takes of the Fly) substantially affects interstate commerce. Just as obviously, the answer to the question – correctly posed – is "No."

Judge Wald's other rationale is fatally flawed as well. Judge Wald posits that Congress possesses the authority to regulate takes of endangered species through its power to regulate "destructive interstate competition." The problem with using that rationale here is that Congress' power in this regard is limited to regulating "destructive interstate competition" which relates to *commerce*. In areas outside of those powers expressly granted to the federal government, the States are sovereign. Not only does the Constitution not forbid "competition" between the several states, that is the very point of federalism and

the genius of our constitutional system. As it has often been observed, the States are the "laboratories of democracy" in which various solutions to problems can be tried to see which succeed and which fail.

d. When Congress enacts a regulation that intrudes into an area of traditional state authority, the regulation should be reviewed with heightened scrutiny because it upsets the federal-state balance.

Fundamental to the Federalism inherent in the Constitution's structure is the notion that the Federal sphere is limited to those areas of national concern enumerated in Article I, § 8. Those remaining powers not expressly ceded by the States to the Federal Government are reserved to the States. U.S. Const. amend. X. As James Madison wrote in Federalist 45, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Lopez*, 115 S.Ct. at 1626. One aspect of the Gun-Free School Zones Act the *Lopez* Court found most troubling was the act's federal intrusion into two areas of traditional State concern-criminal law and education. 115 S.Ct. at 1631. *See also*, 115 S.Ct. at 1638.

> Were the Federal Government to take over the regulation of entire areas of traditional State concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of Federal and State authority would blur and political responsibility would become illusory.

Lopez, 115 S.Ct. at 1638 (Kennedy Concurrence).

When the Commerce Clause is used as a basis for intruding into areas of traditional state authority, the Court must apply greater scrutiny to the encroaching federal statute.

> The statute before us upsets the Federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required. . . . *In a sense, any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.* If Congress attempts that extension, then at least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern. An interference of these dimensions occurs here, for it is well established that education is a traditional concern of the State."

Id. at 1640. (Kennedy Concurrence) (emphasis added).

In this instance, the take provision deeply intrudes into two areas of traditional state authority: land use regulation and wildlife regulation. Unquestionably, those areas of law have traditionally been the province of the States and their localities. *See, e.g., Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta,* 458 U.S. 141, 153 (1982); *Baldwin v. Montana Fish and Game Comm'n,* 436 U.S. 371 (1978).

2. The take provision cannot be upheld as a regulation of the "channels of commerce."

In addition to upholding the take provision under the substantial effects test, Judge Wald also upheld the regulation under the "channels of commerce" category identified in *Lopez*. Judge Wald cited two bases. First, the take

prohibition is necessary to control the transport of endangered species and interstate commerce. Second, the take prohibition falls under Congress' authority to keep the channels of interstate commerce free of "immoral and injurious uses." *NAHB*, 130 F.3d at 1046-49. This is truly a tortured use of the "channels" category. As Judges Henderson and Sentelle noted, the authorities cited by Judge Wald all relate to commercially marketable goods such as guns, lumber and public accommodations. The Fly, of course, is a purely intrastate species and is not a commercially marketable good. Moreover, the regulated activity is not even remotely related to commercial sale or possession of Flies. It is simply illogical to assert the protection of the Flies' habitat is necessary to aid the prohibition of interstate sales of the Fly.

Judge Wald tries to fill the missing interstate commerce nexus by bootstrapping in the fact that the hospital (the construction of which apparently "harms" the Fly) "is presumably being constructed using materials and people from outside the state and which will attract employees, patients, and students from both inside and outside the state." *Id.* at 1048. Under Judge Wald's view, then, the mere fact that a person or object *has been* or *could be* in interstate commerce confers upon Congress the authority to regulate that person or object.

This absurdly expansive view plainly ignores the holding of *Lopez*. "Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity. In my judgment, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use. . . . " *Lopez*, 115

S.Ct. at 1651 (Stevens, J., dissenting). *Lopez* rejected Justice Stevens' extraordinarily broad view of interstate commerce because it places no real limits on and provides no logical stopping point for Congress' commerce power. *Id.* at 1632-34. Obviously, guns – which are manufactured and sold commercially in interstate commerce – have a much closer nexus to interstate commerce than the Fly in question here. Since *Lopez* rejected the "guns as articles of commerce" theory, the same reasoning applies with even greater force to the *ferae naturae* in question here, which are neither manufactured in commerce nor sold in commerce, nor even owned. Similarly, guns – which were the actual *object of the regulation* in *Lopez* – have a much better claim for establishing a nexus with interstate commerce than do the people and construction materials (which are *not* the object of the regulation) employed by Judge Wald. Nevertheless, *Lopez* rejected this view. Wald's reasoning here is not faithful to *Lopez*.

C. Lower court decisions involving congressional regulation of intrastate, non-commercial activity routinely misapply the analysis in *Lopez*.

The Petitioners posit that the lower courts need guidance regarding *Lopez*. While *amici* certainly agree that there is substantial disagreement about the full meaning of *Lopez*, they respectfully suggest that *Lopez*'s analysis regarding intrastate, non-commercial activity is clear – it is simply not being followed by many of the lower courts. The errors in applying *Lopez's* reasoning to the facts of this case are hardly unique. The same type of errors are found throughout other Commerce Clause cases involving regulation of intrastate, non-commercial activity. These errors are in practically all instances case dispositive in favor of upholding the regulation. The primary

example of this is the still-prevalent use of "aggregation" and its relative, "the class of activities."

1. The "aggregation" and "class of activities" principles are routinely misapplied by lower courts in a case dispositive manner.

Just as in this case, lower courts routinely avoid evaluating the obviously minuscule – and often non-existent – effect of a regulated activity on interstate commerce by expanding the "class of activities" which is being analyzed for substantial effects and then "aggregating" the effects of this expanded class with all similar such instances throughout the country. *See, e.g., United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997); *Brzonkala v. Virginia Polytechnic Institute*, 132 F.3d 949 (4th Cir. 1997). Obviously, any class of activities can eventually be defined broadly enough such that the aggregate effect on interstate commerce is substantial. *Lopez* foreclosed this type of aggregation abuse by allowing aggregation only when the regulated activity is commercial in nature.

The "aggregation" and "class of activities" principles are close relatives. Both are rules of law that the Court has fashioned to determine how narrowly or widely to view the effect of the regulated activity on interstate commerce. While aggregation and the class of activities rules are still viable, after *Lopez*, they cannot be applied universally. *Lopez* makes clear that aggregation is not appropriate and a narrower, more focused, inquiry is required when the regulated activity is intrastate and non-commercial in nature. This is particularly true when the regulated activity intrudes into an area of traditional state authority. *Lopez* makes this point forcefully when it states that *all activities* have ultimate commercial origins

or consequences, but that does not place those activities within reach of the commerce power. *Lopez*, 115 S.Ct. at 1633. *See also, id.*, at 1640 (Kennedy, J., concurring). Federalism and respect for our constitutional structure require this focused inquiry. Broader inquiries based on an expansive class of activities or inquiries that rely on attenuated effects on commerce, such as those advanced routinely advanced by the lower courts, "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 1634.

Amici respectfully submit that once a court makes the decision to analyze a class of activities, rather than the actual effect of the regulated activity, and then aggregates those effects, the Commerce Clause element of the case is decided. This case provides the Court with an opportunity to re-emphasize *Lopez*'s central point: when the regulated activity is both intrastate and non-commercial, the court must look only to the regulated activities' effect on interstate commerce.

2. The lower courts are avoiding *Lopez's* substantial effects analysis by shoe-horning cases into the "channels of commerce" and "articles of commerce" categories.

Like the aggregation and class of activities problems discussed above, another trend in Commerce Clause jurisprudence in the lower courts threatens to undermine the limits that *Lopez* re-established on the commerce power. Faced with the rigorous three-part substantial effects analysis, many courts have resorted to shoe-horning cases that previously would have been analyzed

under the substantial effects test into categories one (channels of commerce) and two (articles of commerce). The reason seems clear. Although *Lopez* found that the regulation could not be upheld under any of the three broad categories of congressional regulation, the first two categories were "quickly disposed of" with little analysis, presumably because regulation of gun possession has no obvious connection to either category. *Lopez*, 115 S.Ct. at 1631. The third category – substantial effects – received the vast majority of the Court's attention and analysis. Seemingly to avoid this rigorous analysis, lower courts use tortured reasoning to uphold regulations under the categories one and two. *See, e.g., U.S. v. Kirk*, 70 F.3d 791, 797 (5th Cir. 1995), *aff'd* 105 F.3d 997 (5th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 47.

This case is in many ways perfectly emblematic of that problem. The District Court's opinion upheld the take provision under the "articles of commerce" category on the theory that the Fly, and wildlife in general, are articles of commerce. The District Court fundamentally misperceived what the "articles in commerce" category allows Congress to regulate. As the name obviously implies, Congress can regulate objects or things that are actually *in the stream of commerce*, but Congress cannot regulate an item for eternity simply because it has once been an article in commerce. *Pappadopoulos*, 64 F.3d at 527. If that were true, Congress certainly could have regulated possession of the gun at issue in *Lopez*, as well as anything else that ever could be or has been in commerce, leaving nothing beyond the purview of congressional regulation.

Judge Wald, for her part, tersely rejected the articles of commerce category, merely stating that it is "clear"

that the take provision is "not a regulation of the instrumentalities of interstate commerce or of persons or things in interstate commerce." *NAHB*, 130 F.3d at 1046. Nevertheless, Wald's "channels of commerce" rationale for upholding the take provision falls prey to the very problem: it places no logical limits on the commerce power.

IV. Conclusion

No reasonable person can conclude that harming the Delhi Sands Flower-loving Fly has a substantial effect on interstate commerce. If the regulated activity in this case is upheld as a valid exercise of the commerce power, then there are no appreciable limits on Congress' Commerce Clause authority and the Court will have implicitly ceded to Congress what the Constitution intentionally withheld – a general police power. *Amici* respectfully urge this Court to grant *certiorari* and reverse the Circuit Court's decision upholding the application of the take regulation to the Fly.

Respectfully submitted,

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Dated: May 6, 1998